

CAREN P. SENCER, Bar No. 233488
DAVID W. M. FUJIMOTO, Bar No. 299316
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1375 55th Street
Emeryville, California 94608
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: csencer@unioncounsel.net
dfujimoto@unioncounsel.net

Attorneys for Petitioner INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, DISTRICT
LODGE 725

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 31

CONSOLIDATED NETWORKS
CORPORATION,

Employer,

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, DISTRICT LODGE 725,

Petitioner.

No. 31-RC-263768

**PETITIONER INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, DISTRICT
LODGE 725'S POST-HEARING BRIEF**

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I. INTRODUCTION

The plain terms of the stipulated election agreement—whether analyzed at Step 1 or Step 2 of the test from *Caesar’s Tahoe*, 337 NLRB 1096, 1097 (2002)—limits the petitioned-for unit to the listed employees “employed by the Employer at its operations located at Fort Irwin, California.” Since Consolidated Network Corporation (“Employer”) employee James Overton (“Overton”) is based out of the Employer’s operations located in Alabama, he was intended to be excluded from the unit. Furthermore, at the time of the election, Overton was performing the business development duties of demoing a prototype device that was not in existence prior to manufacturing it—not Senior Network Administrator duties or duties of other petitioned-for employees. And while Overton has on two different occasions in 2020 performed work as a Senior Network Administrator, given the worsening trajectory of the pandemic, the varied roles the Employer has entrusted to Overton, and given that the Fort Irwin employees have now had the benefit of working several rotations—rendering Overton’s support unnecessary—it is too speculative to conclude that he has a reasonable expectancy of returning to the unit at Fort Irwin.

If the stipulated election agreement is deemed to be not clear enough to evince the parties’ intent, Overton does not share a community of interest with the Fort Irwin employees given his superior experience, skills, and certifications, his higher status of reporting directly to one of the founding directors/COO of the Employer, his distant work location, and markedly different role with the Employer. He should therefore be excluded if this analysis is employed.

Lastly, the Union’s challenge to the ballot of James Kwak should be sustained since he had effectively not yet cast his ballot at the moment that he requested that his ballot be withdrawn and therefore could not have been subject to the kind of interference that the Board has tried to prevent with its cases that hold that an employee may not withdraw a cast ballot. Instead, Kwak’s right to not participate in the vote should be honored.

II. ARGUMENT

A. THE STIPULATED ELECTION AGREEMENT LIMITS THE UNIT TO THOSE EMPLOYEES “EMPLOYED BY THE EMPLOYER AT ITS OPERATIONS LOCATED AT FORT IRWIN, CALIFORNIA, SUCH THAT JAMES OVERTON, EMPLOYED IN ALABAMA IS NOT INCLUDED

“To be eligible to vote in a representation election, an employee must be within the proposed bargaining unit on both the established eligibility date and the date of the election.” *Peirce-Phelps, Inc. & Warehouse Employees Union, Local 169 a/w Int’l Bhd. of Teamsters, Afl-Cio*, 341 NLRB 585, 585 (2004) (citing *Plymouth Towing Co.*, 178 NLRB 651 (1969)). “An employee who is transferred out of the bargaining unit before the election will not be eligible to vote unless he or she has a reasonable expectancy of returning to the unit.” *Id.* (citing *Mrs. Baird’s Bakeries*, 323 NLRB 607 (1997)).

When determining whether an individual is included in a stipulated bargaining unit, a three-step test is employed. *Halsted Commc’ns & Local 1430, Int’l Bhd. of Elec. Workers, Afl-Cio*, 347 NLRB 225, 225 (2006) (citing *Caesar’s Tahoe*, 337 NLRB 1096, 1097 (2002)). “First, the Board must determine whether the stipulation is ambiguous. If the stipulation clearly expresses the objective intent of the parties in unambiguous terms, the Board simply enforces the agreement.” *Id.* But if the stipulation is ambiguous, at step two the Board “seeks to determine the parties’ intent through usual methods of contract interpretation, including the examination of extrinsic evidence. If the parties’ intent still remains unclear, the Board will reach step three and employ its standard community-of-interest test to determine the bargaining unit.” *Id.*

When faced with an argument that a disputed employee is a dual employee, a dual employee analysis is “not applied where parties’ intent to exclude classification was clear.” *Id.* (citing *Bell Convalescent Hospital*, 337 NLRB 191 (2001)).

1. Stipulated Election Agreement Clearly and Unambiguously and Means the Listed Employees “Employed by the Employer at its Operations Located at Fort Irwin, California”

a. Overton was Not Employed in the Bargaining Unit at Fort Irwin During any of the Phases of the Mail Ballot Election

The term “employed by the Employer at its operations located at Fort Irwin, California”

is clear and unambiguous. It means that the unit includes only those listed classifications who are employed at the Employer's operations at Fort Irwin, California. Since Overton was not performing the work of a systems, database, or network administrator during the time of the election at Fort Irwin, California, he was not employed in the unit at the time of the election and should be excluded pursuant to the plain terms of the stipulated election agreement.

i. The Petitioned-For Unit's Work is Limited to Systems, Database, and Network Administration on the Army's Fort Irwin Training Systems

The petitioned-for unit's work pertains to the administration of the Army's existing systems, databases, and networks at Fort Irwin. This work is performed pursuant to a sub-contract the Employer has with Lockheed Martin to perform work for the Army (Tr. 25:19-21; 27:20-28:10). The work involves "system administration, help desk, network administration roles. . . . They are more the maintaining sustainers and the operations of the servers, provide support for the end users; sustaining, and maintaining, and ensuring that the network is in a 24-by-7 availability." (Tr. 27:24-28:5). The system administrators "ensure[] that servers are up in 24 by 7. They build user accounts, active directory, assign permissions, they configure the system . . . for a rotation change, they provide tech support to the end user, and they apply system updates. They assist the program manage office with updates and security baseline." (Tr. 31:14-32:4). Database administrators are a blend between a system administrator, along with having a specialty in database administration (Tr. 79:21-25), which gives them additional duties of maintaining "the IA baseline and assist the program management office with the IA baseline of the database," including changing passwords or patching the database (Tr. 80:9-22). Network administrators are "responsible for maintaining, configuring the network switches, routers, firewalls." (Tr. 86:24-87:4). These duties all relate to the government's existing system, databases, and networks (*see e.g.* Union Ex. 2 at 2—listing a Senior Network Administrator's duties as "Installs, configures and maintains network components . . . ; [testing] the NTC IS network [;Coordinates and schedules installation of new network equipment . . . ; [troubleshoots and configures] the NTC IS phone system . . . "). This work was substantially the same work

that CNC had been performed previously on the Warfighter Focus contract back when Raytheon was the prime contractor (Tr. 25:2-6; 185:13-22). These duties do not involve creating, assembling, manufacturing, or informing customers of prototype devices for prospective future use in its systems.

ii. Overton was not Employed at the Employer's Operations in any of the Petitioned-for Classifications at Fort Irwin, California at the Time of the Election and, instead was Performing Business Development Duties

Overton's employment is "based out of" the Employer's Montgomery, Alabama office, including during the pandemic between the March rotation and August rotation (*See* Tr. 100:24-101:2; 101:7-16; 107:11-108:8; 110:20-22; 135:5-19; 198:18-3; 210:2-14). Overton worked at Fort Irwin with the other individuals in the bargaining unit from "August 12th through August 23rd" (Tr. 166:13-167:11).¹ Ballots were mailed out on September 10, 2020 and were counted on September 28, 2020 (*See* Jt. Ex. 1). Overton did not work the September rotation doing the work of the other petitioned-for employees because "travel was—was a problem. COVID travel was still an issue" (Tr. 171:2-10). There was also not an October rotation that he was made aware of by the Employer (Tr. 171:20-24). Therefore, he was not working in the bargaining unit at Fort Irwin at the time of the election.

While Overton worked at Fort Irwin from September 7 through 11, he was not doing network, system, or database administration work. From September 7 to 11, Overton delivered prototypes of the Step kits—that he had created pursuant to a separate government contract with Raytheon—to trainees and military personnel, as well as training them on the advantages of the Step kit (Tr. 173:11-174:2). Leading up to September 2020, since May 2020, Overton had been manufacturing a prototype of the Step kit (Tr. 160:10-23; 208:25-209:7), which was an upgrade of the ORTS kit (Tr. 159:21-160:3).² That Step kit project was a separate contract with

¹ The eligibility period was the payroll period ending August 15, 2020 (Jt. Ex. 1).

² "The ORTS kit is a small mobile router and a tack lane. A tack lane . . . encrypts the data that flows between the router from point A to point B. . . . [T]he router is just a small wireless device that rides on the AT&T, it gets sent to the rotational unit, and gets strapped to a radar truck, and it allows them to track the radar—to display the radar on a 2d map across the playing field during rotation." (Tr. 58:24-59:8).

Raytheon. About “80 to 90 percent of my time was spent on securing, configuring, manufacturing, driving to Lowe’s and . . . getting nuts, and bolts, and screws . . . [Q]uite a bit of time was . . . spent on the manufacturing and ordering, and acquiring equipment through . . . Raytheon, and to . . . receiving that equipment in Montgomery.” (Tr. 166:2-12). His work with the Step box included installing components “into the pelican case, and that’s physically putting them into the box” (Tr. 179:4-14). As Overton explained, “Installing them into the network *has another meaning and function, too*. So yes, I installed them into the - - into the pelican case.” (Tr. 179:4-14). Overton carefully differentiated what he was doing with the Step box with what is called for in Union Exhibit 2, which is “installs . . . network components.” (at p. 8 of PDF, First Bulletpoint under Senior Network Administrator). While installing network components involves installing components into a network, Overton was installing components into the pelican case. Mr. Overton was also testifying about Union Exhibit 2 at this point in his testimony, further supporting that the distinction he was making is meaningful (*See* Tr. 176:15-179:14). While Overton testified that there is configuration involved with the prototype Step box (Tr. 161:3-12; 164:24-166:1) and that the Step box involves IP addresses, switches, routers, and a VPN (Tr. 162:13-164:11), the Step Box is only a prototype as of the hearing and “hasn’t been turned over to the Government customer yet because it [is a] prototype and still requires integration, verification, certification paperwork . . . that allows it to become a permanent element of their network.” (Tr. 179:20-180:2). The experimental and preliminary nature of the Step Box is corroborated by the Employer’s manager William Nault testimony that “[The Step box] would be the replacement to the ORTS kit—the existing ORTS kits now.” (Tr. 60:15-18). This all means that instead of “install[ing], configure[ing] and maintain[ing] network components,” (Union Ex. 2, First Bulletpoint at p. 8 of PDF, First Bulletpoint under Sr. Network Administrator), he was manufacturing a prototype and testing a device that was something that might later—but not now—become a part of the network’s components.

So when Overton was at Fort Irwin from September 7 through 11, he was not functioning in the role of a Senior Systems Administrator—but more as a salesperson for the new Step box.

He gave “many presentations” to various individuals, mostly on a “one-on-one” basis as “people came by to see me and . . . to see the result . . . of the devices” (Tr. 211:6-17). “Based on the visit that I did perform out there related to the . . . prototype device, and I demoed it . . . and they got to look, and touch, and see it(Tr. 162:3-:11). As of the hearing, the government has only “expressed to Raytheon to expand and buy more of these devices to integrate them into the ATMP network.” (*Id.*). In other words Overton’s trip to Fort Irwin on September 7 to 11 was to market and demo the new product that might become a part of the network in the future.

And this was not the first time Overton has been utilized by the Employer for business development. In 2019, Overton was a part of a team that was “the lead engineering mindset . . . or the designers of that [enterprise logging project] system But we were the . . . brain trust of . . . the functionality and the integration building and . . . staging in our . . . Montgomery office [I]t was built and prototyped and a representative sample was created in Montgomery.” (Tr. 147:7-21). Additionally, Overton previously helped in building the SolarWinds tool and trained members of the federal government, including the Health and Human Services Department on the tool (Tr. 194:2-13). This Raytheon project on the Step box was one more “business development” project for the Employer that Overton worked on from about May 2020 through September 2020 (Tr. 201:2-21). Therefore, the September 7 to 11 trip was a business development activity, not one that falls within the work performed by the petitioned-for unit. To be sure, Overton billed his work under the business development Raytheon code for his September 7 to 11 trip (*Compare id. with* Co. Ex. 6 at 8).

The petitioned-for unit is not involved in business development or marketing new products. Therefore, at the time of the mail ballot election—from September 10 to September 28—Overton was not employed in the petitioned-for unit. Instead, he had been transferred out of the bargaining unit and, as such “will not be eligible to vote unless he . . . has a reasonable expectancy of returning to the unit.” *Peirce-Phelps*, 341 NLRB at 585. As will be discussed, there is no reasonable expectancy of returning to the unit.

b. As a Result of the Ongoing and Worsening Pandemic, Overton's Varied Duties, and the Ability of the Fort Irwin Employees to Handle Smaller Rotations Without Fly-Ins, There is No Reasonable Expectancy of Recall to Fort Irwin in the Near Future

While there are approximately ten rotations per year in a normal year, as a result of the pandemic, rotations have been eliminated or reduced in size to limit traveling (Tr. 54:2-55:3). Company Exhibit 5 shows the scheduled rotations from this year through September 2020. The notation "RSOP" shows when rotations begin (*See* Tr. 43:4-8 and Co. Ex. 5). They end where the calendar notes "Regen." (Tr. 44:7-15). Managing Director Ed Kusbel testified that the pandemic is what prevented Overton from being able to do work at Fort Irwin (Tr. 244:17-23). As of the September 28 ballot count—just as right now—Covid-19 cases were spiking in California³ and Alabama.⁴ While there had been progress in the search for a vaccine, as of the election—as is the case now—there was no clear timeline for when vaccines will be available. Since Covid-19 is what prevented Overton from traveling earlier in the pandemic, and since the pandemic's course was worsening as of the election, Overton did not have a reasonable expectancy of returning to Fort Irwin in the near future. To make this more clear, as of September 28, Overton had not been informed whether he would be going to Fort Irwin in October (*See* Tr. 171:20-24—testifying at the November hearing that he is not even aware whether there was a rotation at Fort Irwin in October).

This case lacks the facts necessary to find a reasonable expectancy of recall. In *Extendicare*, the Board found that an employee had a reasonable expectation of returning to the unit because the position he occupied after transferring out of the unit was a 90-day assignment. *Extendicare Health Servs., Inc. d/b/a Arbors at New Castle & United Food & Commercial Workers Int'l Union, Local 27, Prof'l Health Care Div.*, 347 NLRB 544, 548 (2006). Similarly,

³ The Union requests judicial notice of the Covid Tracking Project, relied upon by the New York Times, the Washington Post, CNN, The Wall Street Journal, the New Yorker, Business Insider, FiveThirtyEight, the White House and more for statistics on Covid-19 cases. <https://covidtracking.com/>. For California state data, see <https://covidtracking.com/data/state/california/cases>.

⁴ The Union requests judicial notice of the Covid Tracking Project data for the state of Alabama on new Covid-19 cases. For Alabama state data, see <https://covidtracking.com/data/state/alabama/cases>.

the Board found a reasonable expectation of recall in *Mrs. Baird's Bakeries* because the supervisor told the transport driver employee that his transfer out of the unit was temporary pending a hearing on his DUI charge until his DUI charge was resolved. 323 NLRB at 607. Here, by contrast, Overton is normally “based out of Montgomery, Alabama.” (Tr. 100:24-101:2). Overton is a relatively high level employee who primarily reports to the Chief Operating Officer Ed Kusbel (*See* Tr. 199:19-200:11), who is also one of the Employer’s founding partners (Tr. 223:15-18). Overton also works out of an office in Montgomery, Alabama. For this reason alone, he is not regularly employed at the Employer’s Fort Irwin operations. The Employer utilizes Overton for any number of possible projects. As recently as 2019, Overton had been assigned to be a part of the “engineering mindset . . . or the designers of a[n enterprise logging project] system” on a Perspecta contract (Tr. 147:7-21). Overton was then trusted not only to manufacture the Step kit, but to also provide input into the necessary hours, materials, and cost—information necessary for the Employer to bid on this contract with Raytheon (Tr. 205:11-20). Furthermore, while the Employer initially planned to have Overton oversee the first rotations given that Lockheed was a new customer, by now, the employees at Fort Irwin have performed numerous rotations both with Overton (in March and August 2020) and without Overton (June, July, and September) (Co. Ex. 5 at 6, 7, and 9). The reasons the Employer had for ensuring Overton was present are no longer in existence. Kusbel “wanted to ensure that we provided the best service possible to Lockheed.” (Tr. 228:21-25). Now that the employees at Fort Irwin have performed rotations, it is no longer necessary, if it ever was, for Overton to be present for them—reducing the likelihood that Overton will return to Fort Irwin to work in this role. In sum, Overton’s return to Fort Irwin to work as a Senior Network Administrator is far too open ended and uncertain. *See Sid Eland, Inc.*, 261 NLRB 11, 11 (1982). Therefore, Overton has no reasonable expectation of returning to Fort Irwin and he his ballot should not be counted.

2. **If the Stipulated Election Agreement is Deemed to be Ambiguous, the Extrinsic Evidence Shows that the Parties Intended to Only Include those Employees who Regularly Work at Fort Irwin**

If it is determined that the language of the stipulated election agreement is ambiguous as to the meaning of the Employer's "operations located at Fort Irwin, California," the analysis is the same as discussed above. This is because Employer would argue that "operations located at Fort Irwin, California" means that he works there on occasion. But Employer implicitly recognizes that the petitioned-for unit was only intended to be the employees employed at Fort Irwin, California by arguing that Overton would have worked there if it was not for the pandemic. The pandemic has disrupted much. But the analysis is not what would have happened, but what has happened in the months prior to this petition being filed. Therefore, the question goes back to whether Overton was employed at Fort Irwin at the time of the election or whether he had been transferred out.

As of the date of the election, Overton was not employed as a member in the petitioned-for unit at Fort Irwin, but was instead performing business development. He was therefore not working as a Senior Network Administrator and did not have a reasonable expectation of returning to that position at Fort Irwin.

3. **If the Agreement is Deemed to Not Clearly Evince the Parties' Intent, Overton Lacks a Sufficient Community of Interest to be Included in the Unit and he is not**

If it is determined that the parties' intent cannot be ascertained from the language of the stipulated election agreement, a standard community-of-interest analysis requires Overton's exclusion from the petitioned-for unit. James Overton is also not a dual function employee. Therefore, he should be excluded from the unit.

a. **The Community of Interest Factors Weigh in Favor of Excluding Overton**

Since Overton is predominantly supervised by the COO, who is also one of the founding partners of the Employer, has superior skills and training when compared with the other employees, serves vastly different functions than the other employees, primarily works across the

country in Alabama, and involves only occasional one-way interchange, Overton should be excluded from the petitioned-for unit.

i. Overton’s Supervision, Different Functions, and Office Location Weighs in Favor of Excluding him from the Unit

As discussed previously, Overton is supervised by the COO, while the petitioned-for unit is supervised by William Naught. As already discussed, Overton performs vastly different functions than the petitioned-for unit. And as already discussed, Overton’s office is on nearly the opposite side of the country from Fort Irwin, California. These factors weigh in favor of exclusion from the unit.

ii. Overton’s Certifications and Skills are Superior to Those in the Petitioned-for Unit

Overton is the only employee certified with “SolarWinds” for the Employer (Tr. 193:3-194:1). He has historically been utilized to “implement new . . . and cutting edge capabilities to the Warfighter FOCUS mission.” (Tr. 144:23-145:16). Overton explained he was doing “[c]utting edge material, cutting edge techniques, cutting edge things, and advanced . . . network devices that normal [Cisco Network Administrator] qualified people . . . [do not do] . . .” (Tr. 188:2-21). While CCNA experience is a “very lower level requirement, a lower level knowledge and experience,” it is a minimum requirement of Senior Network Administrator (Union Ex. 2). According to Overton, he is “fly-in support” because “to meet the requirements of putting a . . . body in that seat, all they need is a CCNA. But I know [the Employer’s] reputation is on the line—to make sure this network is constantly working . . . so that’s . . . my opinion as to why I’m the fly-in, constant continuity and support for this contract.” Overton also exceeds the certification requirement for a CompTIA Security+ certification (Tr. 183:22-24), which is a requirement for someone in his role (Union Ex. 2 at p. 8 of PDF, Second to the Last Bullet point). Overton has the CISSP certification that “exceeds the CompTIA Security+ certification. . . it’s a failure of this statement of work to . . . accommodate those with higher levels of certification.” (Tr. 183:25-184:5). Overton is also “an accredited university instructor,” “was an

instructor for a community college of the Air Force,” and has done his “teaching practicum.” (Tr. 199:9-18).

Overton’s superior skills are well-known to the COO of the Employer who specially selected Overton to help the petitioned-for unit during the initial rotations, as the employees at Fort Irwin “was a bit . . . green and not—I’d say they were a bit green, and my concern was . . . I wanted to put the best step forward going to that first rotation.” (Tr. 228:10-20). While the Fort Irwin employees in the petitioned-for unit were “a bit green,” Overton has been networking since 1993 (Tr. 192:9-14). It is evident that Overton’s skills and experience far exceeds that of his coworkers. This factor weighs in favor of exclusion.

iii. Overton’s Occasional One-Way Interchange is Insufficient for Inclusion

One-way interchange does not establish the kind of interchange that two-way interchange does in finding a shared community of interest. *Armco, Inc.*, 279 NLRB 1184, 1218 (1986); *MGM Mirage*, 338 NLRB 529, 533-534 (2002) (citing *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987)). The petitioned-for unit of employees who work at Fort Irwin do not travel for work, “[t]hey just work at Fort Irwin.” (Tr. 239:14-21). And during the year 2020 prior to the August 15 payroll period ending date, Overton had only worked at Fort Irwin in March 2020 and August 2020. And while he communicated with the petitioned-for unit employees about weekly during his business development activities in Alabama, he only communicated with employees in the petitioned-for unit about quarterly when it came to matters at Fort Irwin (Tr. 213:18-24). All in all, this is little communication and weighs in favor of exclusion from the unit.

b. Overton is not a Dual Function Employee

“[E]mployees who perform more than one function for the same employer may vote, even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit.” NLRB Outline of Law and Procedure in Representation Cases, at 288 (citing *Harold J. Becker Co.*, 342 NLRB 51

(2004); *Medlar Electric, Inc.*, 337 NLRB 796, 797 (2002); *Ansted Center*, 326 NLRB 1208 (1998); *Air Liquide America Corp.*, 324 NLRB 661, 662 (1997); *Avco Corp.*, 308 NLRB 1045 (1992); *Continental Cablevision*, 298 NLRB 973, 975 (1990); *Alpha School Bus Co.*, 287 NLRB 698 (1987); *Oxford Chemicals*, 286 NLRB 187 (1987)). “The Board generally finds that dual-function employees should be included in a bargaining unit if they spend 25 percent or more of their time performing unit work.” *Id.* (citing *WLVI Inc.*, 349 NLRB 683, 686 fn. 5 (2007); *Avco Corp.*, 308 NLRB 1045, 1047 (1992)).

Here, it is evident that Overton does not regularly perform duties at Fort Irwin, California. While the Employer will contend that he would have worked more at Fort Irwin if it was not for the pandemic, such an assertion is too speculative. We don’t know what would have happened if the pandemic hadn’t hit the world in 2020. What we do know is that Overton has not regularly performed duties at Fort Irwin in 2020. In total, he has worked 11.8% of his hours at Fort Irwin supporting the ATMP contract with the petitioned-for unit over 23 days total from January 1 to November 13, 2020. Similar to *Mc-Mor-Han Trucking, Co.*, 166 NLRB 700, 702 (1967), Overton has not performed a sufficient amount of work as a Senior Network Administrator at Fort Irwin to demonstrate “a substantial interest in the unit to warrant inclusion.” Therefore, he should be excluded from the unit.

c. Since Overton is Otherwise Employed by the Employer on a Regular Full-Time Basis, a Regular Part-Time Analysis is Not Warranted

While the Union suggested that the *Davison-Paxon* test would be appropriate to apply, that suggestion was incorrect. Overton is “otherwise employed by the Employer on a regular full-time basis,” who would be included in the unit if he regularly performs duties at Fort Irwin. *See Syracuse Univ.*, 325 NLRB 162, 162 (1997). Since he does not meet the standard for inclusion as a dual status employee, he should not be included. *See also Columbia Coll. & Illinois Educ. Ass’n*, 346 NLRB 726, 730 n. 10 (2006) (“*Davison-Paxon*’s 4-hour requirement does not apply to dual-function employees”). Even if *Davison-Paxon* applied, Overton’s 37 hours worked over the 13 weeks preceding the August 15, 2020 payroll period ending date

would be 2.85 hours per week, falling short of the 4-hour per week average. Either way, Overton should be excluded from the unit.

B. JAMES KWAK'S DESIRE TO NOT HAVE HIS BALLOT COUNTED SHOULD BE RESPECTED SINCE HE REQUESTED IT BE WITHDRAWN BEFORE IT WAS COUNTED

Board law has consistently “rejected voters’ *postelection* efforts to withdraw their ballots.” *In Re City Stationery, Inc.*, 340 NLRB 523, 525 (2003) (emphasis added) (citing *Great Eastern Color Lithographic Corp.*, 131 NLRB 1139 (1961)). *Great Eastern Color Lithographic* noted that the Board must ensure:

sufficient safeguards to prevent possible abuses of the election processes. To permit withdrawals of ballots would in certain cases, as [t]here, place the finality of the election in the hands of such voters [who seek to withdraw their ballots]. Moreover, countenance of such a practice could conceivably open our elections to possible abuses since, once the election results were known, pressures of various kinds could be exerted upon voters to withdraw their ballots to achieve a desired election result.

131 NLRB at 1141. Similarly, *In Re City Stationary* stated “[w]e do not allow parties or individuals to abuse our processes or to achieve a desired outcome by pressuring voters to withdraw their ballots.” 340 NLRB at 525. The rationale as stated in these cases makes perfect sense, but does not apply to our case because when James Kwak requested his ballot be withdrawn, it had not yet been effectively cast. “At the time scheduled for the count, the returned envelopes are treated as ‘voters’ approaching the checking table.” NLRB Casehandling Manual, § 11336.5(b) (2020). Here, James Kwak had, prior to the vote count, contacted the Region to request that his ballot not be counted (Tr. 18:16-19:3). Therefore, this case is not like the prior Board cases where an employee whose ballot was challenged after learning of the ballot count later requested to withdraw his or her ballot. In such cases, an employee would be subject to possible abuses or persuasion by one party or another after the initial vote count to withdraw their ballot to support the existing vote count. Here, by contrast, there had not yet been a vote count when Kwak requested to withdraw his ballot. He simply, for whatever reason, decided to exercise his right to not participate in the election. Given that the Board treats returned envelope as voters approaching the check-in table, and given that Kwak requested his ballot be withdrawn

before the vote count, his desire to not participate should be respected. This situation is akin to an employee driving to the site of a manual ballot election and then deciding at the last minute to not walk into the polling place. Kwak's right to refrain from voting in this election under Section 7 of the Act should be honored and his ballot should not be counted.

III. CONCLUSION

For these reasons the Union respectfully requests that its challenges to these two ballots be sustained.

Dated:

WEINBERG, ROGER & ROSENFELD
A Professional Corporation



By: DAVID W. M. FUJIMOTO

Attorneys for Petitioner INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, DISTRICT LODGE
725

150157\1127356

CERTIFICATE OF SERVICE

31-RC-263768

I am a citizen of the United States and an employee in the County of Emeryville, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1375 55th Street, Emeryville, California 94608.

I hereby certify that on December 4, 2020, I electronically filed the forgoing Responsive Statement of Position with the National Labor Relations Board, by using the Board's Electronic Filing system.

On December 4, 2020, I served the following documents in the manner described below:

**PETITIONER INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, DISTRICT LODGE 725'S POST-HEARING BRIEF**

- ☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Judge Andrew S. Gollin
Administrative Law Judge
National Labor Relations Board
Email: Andrew.Gollin@nrlrb.gov

Chad M. Horton
SHAWE ROSENTHAL LLP
One South Street Suite 1800
Baltimore, MD 21202
EMAIL: cmh@shawe.com

Ms. Mori P. Rubin
National Labor Relations Board, Region 31
Regional Director
11500 W. Olympic Boulevard, Suite 600
Los Angeles, CA 90064
Email: Mori.Rubin@nrlrb.gov

J. Michael McGuire
SHAWE ROSENTHAL LLP
One South Street Suite 1800
Baltimore, MD 21202
EMAIL: mcguire@shawe.com

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on December 4, 2020.



Lara Hull